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IN THE

Supreme Court of the United States

October Term, 1968

No. 498

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered June 18, 1968.

Opinions Below

The District Court's opinion (15A)[1] is reported at 261 F. Supp. 832. The opinion of the Court of Appeals for the Third Circuit (4A) is not yet reported.

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[1] Parenthetical numbers followed by the letter "A" refer to pages of the Appendix to this petition. Such numbers followed by the letters "a" and "c" refer to the Appendices to petitioner's main and reply briefs, respectively, in the Court of Appeals, while numbers followed by the letter "b" refer to the respondents' Appendices in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered June 18, 1968 (14A). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In the arbitration of a labor dispute ordered by the District Court in an action under the Labor-Management Relations Act, where petitioner's expert witness refused to continue his direct testimony and to testify to the reasons for his refusal and the arbitrators refused to hear evidence that his silence was wrongfully induced by respondents and others:

1. Whether petitioner was denied due process under the Federal Constitution and a fair hearing under the Labor-Management Relations Act and the United States Arbitration Act.

2. Whether "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" and of "any other misbehavior" by which petitioner's rights were prejudiced within the proper construction of § 10 of the United States Arbitration Act.

3. Whether, in affirming the District Court's denial of a hearing of the claim that the award had been procured by "corruption, fraud or undue means," the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Federal Constitutional Provisions and Statutes Involved

The case involves the Due Process Clause of the Fifth Amendment; § 301 of the Labor-Management Relations Act (61 Stat. 156, 29 U.S.C. § 185); and § 10 of the United States Arbitration Act (61 Stat. 669, 9 U.S.C. § 10). These provisions are printed in the Appendix (1A-3A).

Statement of the Case

Petitioner commenced this action under the Labor-Management Relations Act and the United States Arbitration Act to compel arbitration of a dispute as to the number of men to be assigned to the "M.A.N." stereotype plate-casting machine at the plant of respondent Newark Morning Ledger Co.[2] Petitioner claimed two men were needed, while respondent contended one man was sufficient. On petitioner's motion, the District Court granted summary judgment declaring the dispute arbitrable, directing arbitration and appointing a chairman of the arbitration panel ("the Committee") which also included four other members, two named by petitioner and two by respondent.

At the arbitration hearings petitioner's expert, Pezdirtz, was called to state his opinion that the M.A.N.'s proper operation required at least two men. At that time he was employed by Wood Newspaper Machinery Corporation ("Wood"), and appeared pursuant to petitioner's arrangements with Wood's President, McColley, whereby he was taken off Wood's payroll and petitioner paid his loss of earnings and expenses during his attendance as a witness (45a).

Pezdirtz began testifying on the morning of January 12, 1966 and had not yet stated his expert opinion when

[2] For convenience referred to hereafter as "respondent".

the Committee recessed at the end of the day (46a). While Pezdirtz was testifying that day, and unknown to him and petitioner, Theodore Newhouse, purchasing agent for respondent, telephoned Wood's office in Plainfield, New Jersey. After being told by Romano, a Wood employee, that McColley had given Pezdirtz leave of absence to testify, Newhouse became "upset" and "angry" (115a) and declared that the Newhouse chain was finished with Wood (62a). Romano suggested that Newhouse speak to McColley, who was out of town but would be telephoning Wood's office the next day (63a; 115a).

When the Committee recessed on January 12, Pezdirtz received a message to call Romano (62a). When he did so, Romano described his conversation with Newhouse and instructed Pezdirtz to call McColley at Cleveland the next morning. On hanging up, Pezdirtz told petitioner's officers and counsel of his talk with Romano (62a). Counsel then telephoned Romano, who confirmed his conversations with both Newhouse and Pezdirtz (63a).

Next day, January 13, Pezdirtz called McColley and immediately thereafter informed petitioner's counsel: "I cannot and will not testify. I am to meet McColley tomorrow morning [January 14] at 9:00 A.M. in Plainfield for further instructions. McColley says my testimony will have far more ramifications than he anticipated, and will injure the Wood Company in the trade" (65a). Shortly after, Pezdirtz told petitioner's trial counsel he would not testify further, that his "boss" had "ordered" him not to, since if he did it would "hurt the company" (65a).

When the Committee sessions resumed that morning, Pezdirtz, at the insistence of petitioner's counsel, took the stand but refused to testify and, when asked by petitioner's counsel, refused to state his reasons, saying they were "personal" (46a-47a). Sustaining respondent's objections, the Committee Chairman refused to direct Pezdirtz to state these reasons or to testify further; refused to accept peti-

tioner's offer of proof that the witness' silence was caused by respondent's interference and intimidation; and refused to investigate whether any outside influence was frustrating the Committee's function. The Chairman ruled all these matters "irrelevant" (47a-50a).

Petitioner immediately made, and respondent opposed, an application to District Judge Wortendyke to instruct the Committee to accept petitioner's offer of proof of witness tampering and to advise the Committee of its power to issue subpoenas to persons having knowledge of the facts. Judge Wortendyke said that if he had the authority he would investigate the matter at once, but held that he had no jurisdiction to act while the arbitration was in progress. However, he clearly indicated that in proceedings to vacate the award, petitioner could have a hearing of the witness tampering issue, including an examination of Pezdirtz under oath (50a-52a).

The parties then returned to the Committee. Over respondent's objections, a majority of the Committee issued subpoenas to Pezdirtz, McColley, Romano and Newhouse at petitioner's request for inquiry "as to why this witness is not talking." Pezdirtz was served, but the others avoided service (52a-53a; 61a; 81a-82a).

Next day, January 14, Pezdirtz appearing under subpoena, again refused to testify or to give reasons for his refusal. The Chairman again refused to direct him to answer or to accept petitioner's offer of proof, ruling the inquiry "irrelevant." Like Judge Wortendyke, he suggested that such an inquiry would be appropriate in the District Court on a motion to vacate the award (53a-56a). The Committee then took a five-day recess to permit Pezdirtz to consult his personal counsel, retained for him earlier that morning (58a-59a).

During the recess and at petitioner's request, two stereotypers examined the M.A.N. in an effort, later rendered abortive when the Chairman ruled them incompetent as

experts, to supply the loss of Pezdirtz' expert testimony (59a; 70a-72a).

When hearings resumed on January 19, Pezdirtz announced his willingness to testify and the Chairman directed petitioner's counsel to proceed with his direct examination of the witness (59a). Counsel declined to do so, because the Committee's refusal to inquire, or to permit inquiry, or to accept an offer of proof as to the matter of witness tampering had rendered Pezdirtz so unreliable and incredible that petitioner could no longer present him as its witness and continue to vouch for his credibility. Petitioner explicitly reserved its right to attack as improper any award which might later be rendered (60a-61a). Thereupon Pezdirtz was dismissed by the Committee (60a-61a), petitioner's counsel refusing to do so, again in order to avoid any possible waiver of petitioner's rights.

The hearings continued through February 18. The Committee's award adverse to petitioner (petitioner's designees dissenting) was filed June 30, 1966 and it relied largely on testimony by respondent's experts, who became the only expert witnesses in the case after Pezdirtz had been silenced (38a-39a; 44a).

On the foregoing facts sworn to in affidavits, petitioner moved the District Court for an order pursuant to § 301 of the Labor-Management Relations Act and § 10 of the United States Arbitration Act vacating the award because (a) it had been procured by corruption, fraud and undue means and (b) a majority of the Committee were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and other misbehavior by which petitioner's rights were prejudiced (40a-41a). Respondent's opposing affidavits having put some of the facts in issue, petitioner moved for a full hearing of its witness tampering claim by the District Court (28A, 20-21c, 26c, 29-30c).

Petitioner's motions were denied and respondent's cross-motion for confirmation of the award and its entry as a judgment of the District Court was granted (28A). That judgment was affirmed by the Court of Appeals (14A).

Reasons for Granting the Writ

The refusal of the Committee and the lower courts to grant a hearing on the question of witness tampering has resulted in a denial of procedural due process, a deprivation of petitioner's rights and remedies under the Labor-Management Relations Act and the United States Arbitration Act, and a departure from the accepted and usual course of judicial proceedings. Taken together, these constitute a special and important reason to grant the writ.

1.

This case presents an important question of federal law which has not been, but should be, settled by the Court. While there have been strong suggestions that "the salutary safeguards of due process of law" must be met in labor arbitrations (Justice Black, dissenting in *Carey* v. *Westinghouse Electric Corp.*,[3] 375 U.S. 261, 273-274 (1964)), and confident prophecy that "the requirements of basic due process will without doubt be held applicable [by the courts] to the arbitration procedure" (Hays, *Labor Arbitration, A Dissenting View*, 105 *et seq.* (1966)), our research has disclosed no reported case squarely holding that the requirements of procedural due process must be satisfied in the

[3] As Justice Douglas noted in his majority opinion in *Carey* (375 U.S. at 270-271), the National Labor Relations Board "shows deference to the arbitral award, *provided the procedure was a fair one and the results were not repugnant to the Act.*" (Emphasis added.) See Note, *The NLRB and Deference to Arbitration*, 77 Yale L. J. 1191 (1968).

arbitration of labor disputes under the Labor-Management Relations Act and the United States Arbitration Act.

The District Court, "assuming any such constitutional right existed", but not deciding that it does, held that the Committee's rejection of evidence of witness tampering did not deprive petitioner of due process or of "a fair hearing" (27A). Although the due process question was fully briefed, the Court of Appeals did not decide the case explicitly in terms of due process, but held that petitioner had not been deprived of "a fair hearing" (12A-13A).

As a result petitioner has been completely foreclosed from having its day in court on the issue of witness tampering, and hence has not been accorded even the minimum requirements of procedural due process. "It is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court . . ." *Galpin* v. *Page,* 85 U.S. (18 Wall.) 350, 368 (1874).

In proceedings of a quasi-judicial as well as judicial character due process demands that parties "be protected by the rudimentary requirements of fair play," i.e., be afforded "a fair and open hearing" which "embraces . . . the right to present evidence" and "those fundamental requirements of fairness which are of the essence of due process in a proceeding of judicial nature." *Morgan* v. *United States,* 304 U.S. 1, 15, 18-19 (1938).

Since arbitrators "act in a quasi-judicial capacity, in place of a court," *Kentucky River Mills* v. *Jackson,* 206 F.2d 111, 117 (6th Cir.), *cert. denied,* 346 U.S. 887 (1953), it follows that principles of due process are also applicable to arbitration proceedings.

It is of special importance that requirements of due process be met in arbitrations under the Labor-Management Relations Act, because the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike, *Textile Workers Union* v. *Lincoln Mills,* 353 U.S.

448, 455 (1957), and "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government," *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). And as the labor arbitrator is a vitally important part of the "system of industrial self-government" created by the bargaining agreement, whose decisions are final and only rarely reviewable by the courts, *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960), his power is necessarily subject to the restrictions and limitations of public policy, *The Torrington Co.* v. *Metal Products Workers Union Local 1645*, 362 F.2d 677 (2d Cir. 1966), of which due process is essentially a part.

If the decisions below are permitted to stand, they will have an injurious precedential effect on future labor-management arbitrations,[4] the standards governing their conduct and that of arbitrators, and the proper exercise of judicial power to vacate arbitration awards. They seriously impair the viability of arbitration and undermine the integrity of the arbitration forum.

Under the aegis of the lower courts, witnesses may be intimidated, spoliated and suppressed, and arbitration proceedings disrupted and sabotaged, resulting in brazen obstruction of the administration of justice. Nevertheless, the arbitrator may refuse to investigate this interference with his function on the ground that the inquiry would be "irrelevant" to the substantive question before him, even though the evidence suppressed is directly probative of that question. With his arbitral inaction, how-

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[4] It is estimated that at least 20,000 cases are arbitrated every year, Herzog and Stone, *Voluntary Labour Arbitration in the United States*, 82 Int'l Lab. Rev. 301 (1960). Approximately 94 percent of all bargaining agreements, of which there are estimated to be about 150,000, provide for arbitration of some or all contract disputes. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-1, Major Collective Bargaining Agreements 1 (1964).

ever arbitrary, a court may not interfere, at least not while the arbitration proceedings are in progress and the arbitrator has exclusive jurisdiction. Even after an award has been rendered, a court may not set it aside, since the arbitrator's refusal to hear evidence of witness tampering is merely an evidentiary ruling which may not be judicially reviewed, unless it can be proved that the arbitrator's refusal was corrupt, fraudulent, or procured by undue means. Thus the powers of arbitrators have been grossly enlarged and those of the courts to review arbitration proceedings and awards have been emasculated. These results surely are not within the contemplation of parties to bargaining agreements providing for arbitration, nor were they intended by Congress in enacting the Labor-Management Relations Act and the United States Arbitration Act.

If, as here, one party to a labor arbitration may be victimized with impunity by the corrupt practices of his adversary, arbitration will surely fall into disfavor and atrophy from disuse.

2.

Whether petitioner was accorded procedural due process—whether the arbitration was inherently fair—is inextricably involved in the lower courts' consideration of the statutory question whether "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" or "of any other misbehavior by which the rights of [petitioner] have been prejudiced" within § 10 of the United States Arbitration Act. For these provisions are really the statutory requirements of due process in arbitration proceedings.

The Court of Appeals erroneously minimizes the Committee's refusal to inquire into the silencing of Pezdirtz as "an erroneous ruling by arbitrators, which does not

affect the fairness of the proceeding as a whole" (13A). This conclusion derives from the false premises that the matter of witness tampering "was peripheral to the issue of fact which was before the arbitrators for decision"; and that even if the inquiry sought by petitioner had resulted in "vindication of the integrity of the proceedings," it "would not affect the question whether the union [petitioner] had a fair hearing on the factual issue whether the M.A.N. machine could be safely and effectively run with one operator" (13A).

But the silencing of Pezdirtz was certainly not "peripheral" to the hearing. Directly to the contrary, it was an assault on the integrity of the hearing, disrupting the proceedings and obstructing the administration of justice in the very forum established by contract of the parties as specifically enforced by the judgment of the District Court.

Nor was the silencing of Pezdirtz "peripheral" to the manning issue before the Committee. That issue depended for solution on expert testimony and Pezdirtz was petitioner's only expert witness. His silencing deprived petitioner and the Committee of vitally important evidence directly bearing on the manning issue in arbitration. The Committee's refusal to take any self-protective action whatever, its rejection of evidence that respondent and others had influenced the witness, and its obstructive prevention of petitioner's attempted inquiry into the matter "shock the sense of fair play—which is the essence of due process." *Galvan* v. *Press,* 347 U.S. 522, 530 (1953).

Persisting in its myopic view of the question as one of evidence rather than of due process, the Court of Appeals held that, *even assuming there was witness tampering,* the Committee's refusal to investigate it did not prejudice petitioner's rights, because:

> "While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a

> matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case" (12A).

We read this to mean that a party may silence an opposing witness, provided he has a strong enough case on the merits—an outrageous proposition on its face.

This holding contradicts explicit decisions of this and other courts to the contrary. See, e.g., *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1943). In that patent infringement suit, plaintiff submitted to the Third Circuit Court of Appeals an article representing the patented device as an advance in the art, purportedly written by a disinterested person but actually prepared by plaintiff, and obtained a decision that the patent was valid and infringed. After discovering the facts, defendant petitioned the Court of Appeals to set aside the judgment previously entered pursuant to its mandate. Relief was denied on the ground that, in view of the other evidence supporting the patent, it was impossible to say that had the court known the article was spurious, its original decision would have been different (137 F.2d 764, 768-69). Unanimously reversing, this Court said through Mr. Justice Black:

> "Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness" (322 U.S. at 247).

See also *Barr Rubber Products Company* v. *Sun Rubber Company*, 277 F. Supp. 484, 500, n. 18 (S.D.N.Y. 1967);

Singer Sewing Machine Co. v. *American Safety Table Co.*, 88 F. Supp. 260 (E.D. Pa. 1949).

This same principle was applied to arbitration in *Insurance Company of North America of Philadelphia* v. *Hegewald*, 161 Ind. 631, 647, 66 N.E. 902, 908 (1903), the Supreme Court of Indiana stating:

> "A rule which seems to be reasonable, and one well settled by authorities, is that a party to an arbitration, who by his own acts, either attempts to corrupt or improperly influence one or more of the arbitrators to make an award in his favor, can not be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed. If the conduct of such party had a tendency to affect improperly the decision of the arbitrator or arbitrators in the matter in issue, it will be held to be sufficient to invalidate the award, without inquiring as to whether the conduct or act in question actually produced any harmful results to the complaining party."

So here, *on the assumption of the Court of Appeals that respondent was guilty of witness tampering*, neither respondent nor the courts are in a position to assert that, even if proved, it would not have changed the outcome or that, had Pezdirtz been permitted to testify without interference, his testimony would not have outweighed respondent's evidence and resulted in an award favorable to petitioner.

The Court of Appeals, again *assuming witness tampering*, holds further that since petitioner's counsel refused to continue direct examination of Pezdirtz on the merits when he changed his mind and announced his readiness to resume his testimony, petitioner may not complain that respondent deprived it of the witness:

> "It [petitioner] could not by its own conduct make the effort it attributed to the [respondent] successful and then protest at the success" (12A).

This holding misses the point that petitioner declined to proceed blindly with the witness because the Committee was preventing inquiry into the reasons for his original refusal to testify and his later consent to do so. It was this right to a fair hearing—to arbitral and procedural due process—which petitioner feared it might waive if it proceeded with the witness as the Committee Chairman directed it to do. However, both lower courts have held that the very action which petitioner took to avoid a waiver of its right to vacate the award because of the denial of due process constituted a forfeiture of that right.

In any event, this finding that petitioner caused respondent's "effort" to spoil the witness to be "successful" ignores all the efforts made by petitioner to inquire into respondent's conduct and its effect on the witness. Even more unrealistically, it disregards the fact that respondent had thoroughly spoiled Pezdirtz as a witness from the moment it first induced him to refuse to testify. His reliability was destroyed by his repeated refusals to testify or to state the reasons for his refusal. His belated and reluctant offer to resume his testimony, after a lapse of five days, could not repair this damage to his credibility, particularly since any chance of rehabilitating him was foreclosed by the Committee's refusal to permit petitioner's counsel to obtain from the witness an explanation of his chameleonic conduct. Even if, upon resuming, the witness had continued to give testimony favorable to petitioner, it would merit little credence in view of his erratic behavior. If, on the other hand, his testimony was unfavorable to petitioner, while petitioner might have sought to impeach him, this would have been an idle exercise, for witness impeachment is not substantive proof and false testimony proves nothing. *New York Life Insurance Co.* v. *Bacalis,* 94 F.2d 200, 202 (5th Cir. 1938); 3 Wigmore on Evidence § 1018 (3d ed., 1940).

When the Committee directed petitioner's counsel to proceed with the witness, it placed petitioner in a highly

prejudicial dilemma. If petitioner proceeded with the witness, it would waive its right to a hearing as to respondent's interference with the witness on a motion to vacate the award. If petitioner refused to proceed, it would, as both lower courts have since held, waive the right to claim it had been deprived of the witness. Thus, far from being fair, the conduct of the hearing at this stage entrapped petitioner into a position where, no matter what it did, it was bound to forfeit its rights.

But even assuming it was an error of judgment for petitioner's counsel to refuse to proceed with the witness under these circumstances, this misstep should not deter this Court from intervening to devitalize the judgment below in order to preserve the integrity of the arbitral process. As this Court said in *Hazel-Atlas Glass, supra,* at 246:

> "The Circuit Court . . . thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. . . . But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. [Citations omitted] Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

So here, this case does not concern the parties alone. Tampering with the administration of justice in a labor arbitration ordered by a federal court under federal

statutes involves far more than injury to a single litigant. It is an erosion of the grievance machinery which pulsates at the very heart of the system of industrial self-government, whose protection should not be held to depend on the astuteness and agility of counsel in sidestepping a series of pitfalls created by an arbitrator's unorthodox rulings and induced by the contrivances of the other side.

3.

The District Court's denial of a hearing into the charge of witness suppression deprived petitioner of constitutional due process and of the remedies provided by the Labor-Management Relations Act and § 10 of the United States Arbitration Act.

"Whenever necessary to the protection of the parties [due process] must give them an opportunity to be heard respecting the justice of the judgment sought." Lester S. Jayson and Norman J. Small, eds., *The Constitution of the United States of America—Analysis and Interpretation,* 1185 (1964). The petitioner was denied this constitutional right by the District Court.

The District Court also denied petitioner the remedy expressly provided by § 10(a) of the United States Arbitration Act which empowers a court to vacate an award

> "(a) Where the award was procured by corruption, fraud or undue means."

On motion to vacate the award on these grounds, petitioner was entitled to a full and fair hearing, including the right to produce evidence that the award had been procured, through witness suppression and spoliation, "by corruption, fraud or undue means."

The Court of Appeals tries to vindicate the denial of such a hearing by a construction of the words "corrup-

tion, fraud or undue means'' in § 10(a) which is peculiar to say the least. A distinction is said to exist between a ''perjured'' and a ''stifled'' witness. The court assumes that an award obtained by ''perjured testimony'' would be one procured by ''fraud'' under § 10(a), but notes that the award here is attacked not because Pezdirtz gave ''perjured testimony,'' but because he had been ''stifled.'' The refusals of the Committee and the District Court to take proof that the witness had been ''stifled'' by respondent are upheld because, says the Court of Appeals:

> ''The award followed after a conscious [*sic*] judgment by the arbitrators that the panel should not undertake an investigation of the union charge and there is no claim that the panel's conduct was corrupt or fraudulent or influenced by undue means'' (11A).

This contrived distinction between ''perjured'' and ''stifled'' testimony is manifestly invalid. Surely to stifle a witness is corrupt, just as it is corrupt to suborn him. An award procured by witness intimidation is fraudulent just as is one obtained by perjury. A cause may be defeated by the deprivation of indispensable testimony as by the concoction of perjured testimony. Proof of either type of ''corruption, fraud or undue means'' warrants vacating an award. Opportunity to present such proof must be given, if not by the arbitrator, then surely by the court preliminarily to either confirming or vacating an award. The demands of due process and fundamental fairness require no less.

Indeed, at one stage of the proceeding the District Court itself recognized this. When petitioner applied for relief on January 13, 1966, the day Pezdirtz first refused to testify, Judge Wortendyke stated the interests of justice required that every attempt be made ''to smoke out any possible fraud which might threaten to taint the proceedings'' whether in ''court or before an arbitrator''

(51a, 52a). As he stated this in connection with Pezdirtz' refusal to testify, at that time he clearly regarded witness stifling as "fraud" within § 10(a) of the United States Arbitration Act.

In view of this, the following holding of the District Court is simply incomprehensible:

> "The merits of the controversy submitted to the arbitrators were not dependent upon the attitude of Newhouse toward the employer of Pezdirtz nor can the award be said to have been procured by corruption, fraud or undue means because Newhouse, learning of Pezdirtz's testimony, had allegedly threatened to deprive the Wood Company of his business, and thereby allegedly prevented Pezdirtz from continuing to serve as an expert witness by the order, or at the request, of his employer." (26A)

The District Court's summary denial of a hearing to establish this stifling and fraud is hard to comprehend in view of the court's assurances on January 13 that a hearing would be provided on a motion to vacate the award:

> "It occurs to me, however, that upon proceedings taken under the Arbitration Act to forestall the entry of judgment on the award, I would think that an application to the Court might be made for the taking of the witness' [Pezdirtz'] deposition at his place of residence or other convenient location, and I would think that that would serve since he would be under oath and be equally liable to be charged with perjury if he did not tell the truth. I believe that that should serve your needs, but I cannot at the present time grant you the relief that you ask" (60b).

Such a hearing in a case of witness suppression and spoliation is indispensable. For the

> "duty of the Law and the Courts is flagrantly neglected when the *intimidation of witnesses* is allowed to be practised unchecked." 8 Wigmore on Evidence § 2192 (3d ed., 1940).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
September 4, 1968

Respectfully submitted,

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